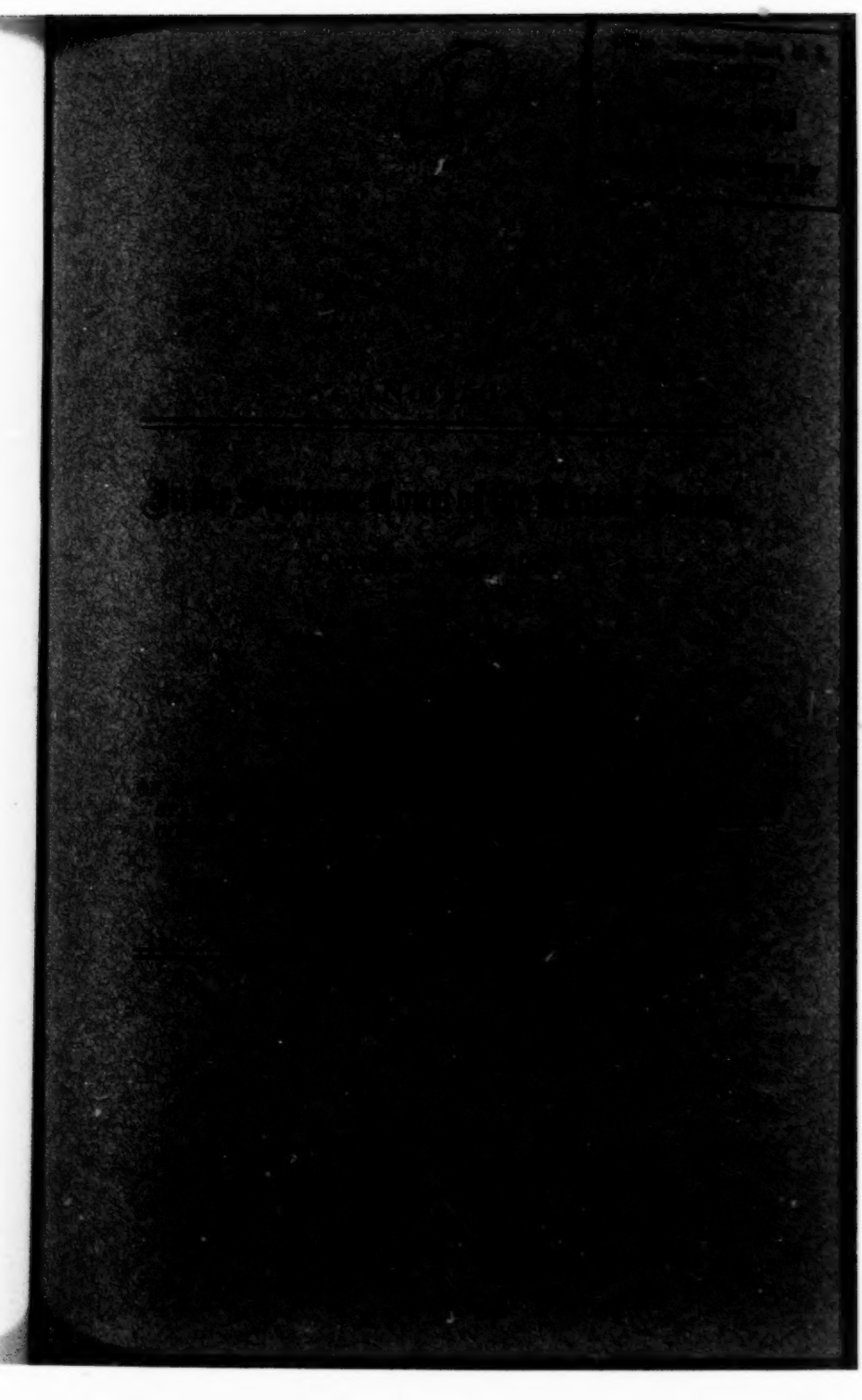

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Section 3 2
Section 37 of the Criminal Code, 18 U. S. C. 88 3

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 156

PETER W. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 864–869) is reported at 135 F. (2d) 867.

JURISDICTION

The judgment of the circuit court of appeals was entered June 7, 1943 (R. 869–870). The petition for a writ of certiorari was filed July 12, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction.

2. Whether the conspiracy to violate the National Stolen Property Act had terminated at the time of the commission of the overt acts, which were alleged to have occurred in the state of destination subsequent to the interstate transportation.

3. Whether the trial court committed error in failing to declare a mistrial after directing a severance as to one of the defendants at the opening of the trial because of his contumacious conduct.

4. Whether it was error to admit evidence that a codefendant had on previous occasions sold stolen securities.

5. Whether it was improper for the trial judge in his charge to the jury to suggest hypothetical circumstances involving the defendants for the purpose of illustrating a point of law.

STATUTES INVOLVED

Section 3 of the National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, as amended by the Act of August 3, 1939, c. 413, Sec. 1, 53 Stat. 1178 (18 U. S. C. 415), provides in pertinent part as follows:

> Whoever shall transport or cause to be transported in interstate or foreign com-

> merce any * * * securities * * * of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both * * *.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

An indictment in two counts was returned against petitioner and five others[1] in the United States District Court for the Southern District of New York, charging them with having transported and caused to be transported in interstate commerce stolen securities of the value of more than $5,000, knowing them to have been stolen, and with having conspired to commit that offense (R. 5–8). The defendants Blaser and

[1] George A. Turley, Chester G. Bollenbach, Herbert G. Jacobson, Fred Blaser, and Ernest D. Ingalls.

Ingalls pleaded guilty (R. 18, 162, 229), the court directed a severance as to Bollenbach shortly after the opening of the trial (R. 40), and petitioner, Turley, and Jacobson were jointly tried and convicted (R. 834). Petitioner was sentenced to two years' imprisonment on the first count and to ten days' imprisonment on the second, to run consecutively (R. 27). On appeal by petitioner and Turley, their convictions were affirmed (R. 869–870).

The evidence against petitioner may be summarized as follows:

Petitioner was engaged in New York City in the business of obtaining and selling lists of stockholders and bondholders, particularly of companies in the process of reorganization (R. 79, 82, 688, 708). He had known the defendant Bollenbach for ten years and the latter had used his office as a mailing address (R. 80, 710). The defendant Turley was a practicing attorney. He also financed the securities brokerage business conducted by the defendants Blaser and Ingalls (R. 165–169, 230–231). Petitioner had known Turley since 1935 (R. 357, 359).

In April 1937 it was discovered that 25 gold notes attached to proofs of claim filed in the reorganization proceedings of the Minnesota and Ontario Company were missing from the files of the United States District Court at Minneapolis, Minnesota (R. 47–48, 50). No one had been authorized to remove these notes from the files

(R. 48). Petitioner and Bollenbach had been in Minneapolis late in January 1937 (R. 51, 55, 60, 71, 81), and Bollenbach had examined the files where the notes were kept (R. 51, 55). Petitioner admitted on cross-examination that he too had been in the court house in Minneapolis and had inspected court records in the reorganization (R. 707–708). He also admitted that either on his way to or return from Minneapolis he had telephoned Turley in New York from Chicago (R. 712).

About the first of February 1937, Bollenbach, under the alias of Berendson, rented an office in New York City (R. 91) which he kept for about three weeks (R. 92). Petitioner also returned to New York on February 1, 1937 (R. 704), and was frequently seen in Bollenbach's office during the early part of that month (R. 91). Bollenbach had the notes which had been stolen from the files of the district court in Minneapolis and attempted to dispose of ten of them through Hart Smith & Co. (R. 101–105), but was unsuccessful when that company became suspicious of a typewritten endorsement in the name of Berendson which appeared on its check given in payment for the notes and therefore stopped payment on the check (R. 123–124, 284–285). The sale of the remaining fifteen notes was effected by Bollenbach and Turley through the defendants Blaser and Ingalls (R. 172, 174–175, 176–178, 232–233) and the proceeds of the sale were de-

livered by Ingalls to Turley on February 11, 1937 (R. 233, 234). Petitioner was in Turley's office at the time the money was delivered and received a substantial portion of it (R. 234–235).[2] On February 15, 1937, petitioner deposited $1,200 in cash in the bank account which he maintained under the business name of the Bond and Share List Company (R. 269, 698, 705). Petitioner's usual deposits in that account totalled about $250 a week (R. 83).

ARGUMENT

1. Petitioner challenges (Pet. 10, 16–24) the sufficiency of the evidence to support his conviction, both on the substantive and the conspiracy counts. The circuit court of appeals, however, found the evidence of petitioner's guilt "substantial" (R. 867).

This is not, as petitioner asserts (Pet. 16–20), a case in which the jury was allowed to base inference on inference and thus to predicate its verdict on speculation alone. As shown in the Statement, *supra,* pp. 3–6, the prior relationship of petitioner with Bollenbach and Turley, petitioner's presence in Minneapolis at about the same time Bollenbach was there, his telephone conversation with Turley during his trip, the disappearance of the gold notes from the files of the district court at Minneapolis and their reap-

[2] Ingalls, who testified for the Government, said that petitioner received a "stack of bills" after Turley had pocketed some of the money and paid Ingalls (R. 234–235).

pearance in New York in Bollenbach's hands, petitioner's constant association with Bollenbach in New York during the critical period when the notes were being sold, and his substantial share in the proceeds of the sale, were all proved by direct evidence. The jury obviously inferred from this collocation of circumstances that petitioner transported or participated with Bollenbach in the transportation of the notes from Minneapolis to New York. Such an inference is not only possible under the evidence;[3] it is, we submit, almost inevitable. In particular, petitioner's participation in the profits of the venture although he did not act as a broker in effecting the actual sales, coupled with the admitted fact that he was in Minneapolis shortly before the notes were first offered for sale in New York, points inescapably to the conclusion that he was an active participant in the unlawful transportation of the notes. Cf. *United States* v. *Seeman*, 115 F. (2d) 371, 374 (C. C. A. 2).

The same facts amply show that there was a conspiracy among the defendants to transport the stolen notes to New York and dispose of them there. It is settled, of course, that a con-

[3] The evidence, with the inferences reasonably to be derived therefrom, must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Meyers* v. *United States*, 94 F. (2d) 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583.

spiracy need not be proved by direct evidence, but may be inferred from the circumstances and the acts of the parties. *Direct Sales* v. *United States,* No. 593, October Term, 1942, decided June 14, 1943; *Glasser* v. *United States,* 315 U. S. 60, 80; *United States* v. *Manton,* 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *United States* v. *Harrison,* 121 F. (2d) 930, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661. And, contrary to petitioner's contention (Pet. 20–24), his acts subsequent to the actual transportation were relevant as circumstances to be considered in determining his original intent and the existence of a conspiracy among the parties. *United States* v. *Seeman,* 115 F. (2d) 371, 373 (C. C. A. 2); *Shama* v. *United States,* 94 F. (2d) 1, 4 (C. C. A. 8), certiorari denied, 304 U. S. 568; *United States* v. *McGuire,* 64 F. (2d) 485, 493 (C. C. A. 2), certiorari denied, 290 U. S. 645.

2. There is no merit in petitioner's further contention (Pet. 11, 20–24) that the conviction on the conspiracy count cannot stand for the reason that the overt acts charged in the indictment did not occur until after the notes had come to rest in New York, and particularly because the only overt act in which his participation was proved, the third, relating to a meeting at which the spoils were divided (R. 7; cf. R. 234–235), did not take place until February 11, 1937, after the notes had been sold. As the circuit court of appeals held (R. 869), "it is immaterial when, if ever, the notes ceased to

be in interstate commerce before the conspirators disposed of them." A conspiracy continues until the object for which it was formed has been accomplished. *McDonald* v. *United States,* 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Laska* v. *United States,* 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Skelly* v. *United States,* 76 F. (2d) 483, 489 (C. C. A. 10), certiorari denied, 295 U. S. 757; *United States* v. *McGuire,* 64 F. (2d) 485, 492 (C. C. A. 2), certiorari denied, 290 U. S. 645; *Loftus* v. *United States,* 46 F. (2d) 841, 847 (C. C. A. 7); *Wilkerson* v. *United States,* 41 F. (2d) 654, 655 (C. C. A. 7), certiorari denied, 282 U. S. 894; *Bellande* v. *United States,* 25 F. (2d) 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607. Clearly, the purpose of this conspiracy was not accomplished until the notes had been sold and the proceeds distributed among the conspirators. Hence, all the overt acts charged and proved were in furtherance of a continuing conspiracy.

In any event, since a purpose of the transportation of the stolen notes was, unquestionably, to sell them in New York, interstate commerce continued until the notes were delivered for sale in that state. (Cf. *Levi* v. *United States,* 71 F. (2d) 353, 354 (C. C. A. 5); *Farris* v. *United States,* 5 F. (2d) 961, 962 (C. C. A. 7).) The conspiracy therefore continued at least until that time. The first two overt acts charged—the conversations among Tur-

ley, Blaser, Ingalls, and Bollenbach (R. 7)—occurred before fifteen of the notes were handed over to Blaser and Ingalls to be sold (R. 174–176, 233). Even if the third overt act, the division of the spoils on February 11, 1937 (R. 234–235), is deemed to have occurred after the conspiracy had terminated, petitioner was properly convicted since the proof showed that he was a member of the conspiracy when the other overt acts occurred. It was unnecessary to prove that petitioner personally committed any of the overt acts charged; it was sufficient to show that one of the conspirators committed an overt act. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253–254; *United States* v. *Rabinowich,* 238 U. S. 78, 86; *Bannon* v. *United States,* 156 U. S. 464, 468.

3. Petitioner complains (Pet. 9, 12–14) that he was prejudiced by the failure of the trial judge to discharge the jury and declare a mistrial after directing a severance as to the defendant Bollenbach because of the latter's contumacious conduct in his opening statement to the jury.[4] The record shows that the trial judge took great care

[4] Bollenbach's speech to the jury, which is included as part of Appendix B of the petition (pp. 37–41), was not incorporated into the record by the bill of exceptions (see R. 31–32, 861). Petitioner's claim of prejudice is grounded upon Bollenbach's statement that he would prove that a Government agent had "browbeat" a young lady, presumably a friend of petitioner's. Petitioner asserts that by these remarks, Bollenbach "attempted to defend" petitioner and suggested to the jury "that there was some connection between"

to assure a fair and impartial trial. Although at first reluctant to grant a severance as to Bollenbach because of his conduct (R. 33–34), the judge later did so when he became convinced that Bollenbach might so conduct himself during the course of the trial as to prejudice the other defendants (R. 38–40). Before allowing the trial to proceed before the jury which had already been impanelled, the judge polled the jury to ascertain whether any of the jurors would be prejudiced against the remaining defendants by reason of Bollenbach's conduct and the judge's action in sentencing him for contempt (R. 41–42). It is significant, too, that following Bollenbach's remarks of which petitioner now complains petitioner's counsel moved in the alternative for a severance or a mistrial and disclaimed any desire for a mistrial if the motion for a severance were granted (R. 37–38). Clearly, the trial judge acted with care and deliberation before allowing the jury to hear the case. Under such circumstances the exercise of his discretion is not subject to review. *Stroud* v. *United States,* 251 U. S. 15, 20; *United States* v. *Hirsch,* 74 F. (2d) 215, 219 (C. C. A. 2); *Van Riper* v. *United States,* 13 F. (2d) 961, 967 (C. C. A. 2), cer-

them (Pet. 2–3; see also Pet. 13). The remarks were but an insignificant part of Bollenbach's violent tirades for which he was later adjudged to be in contempt. Following this, but before any evidence had been taken, the judge directed that the trial be severed as to Bollenbach (R. 40).

tiorari denied *sub nom. Ackerson* v. *United States,* 273 U. S. 702; *Belvin* v. *United States,* 12 F. (2d) 548, 550 (C. C. A. 4), certiorari denied, 273 U. S. 706; *Marrin* v. *United States,* 167 Fed. 951, 953 (C. C. A. 3), certiorari denied, 223 U. S. 719.

4. Petitioner objects (Pet. 10, 15–16) to the admission of evidence that the defendant Turley had previously engaged in selling securities which had been stolen or obtained by fraud (R. 408–420, 458–467, 520–523, 571–577, 602, 605–608). This evidence that he had "created a market" for the stolen notes involved in the instant case was proper to establish Turley's part in the substantive offense. *United States v. Crimmins,* 123 F. (2d) 271, 273 (C. C. A. 2); *United States* v. *Seeman,* 115 F. (2d) 371, 373 (C. C. A. 2). Petitioner did not object to the evidence when it was introduced, and the record is barren of any request by petitioner to have the admission of the evidence limited to Turley, although the trial judge himself did so limit some of it (R. 409). Moreover, there was nothing to indicate that petitioner was in any way involved in Turley's prior activities, and the evidence concerning them could not have prejudiced petitioner. Cf. *Andrews* v. *United States,* 108 F. (2d) 511, 514 (C. C. A. 4); *Loftus* v. *United* States, 46 F. (2d) 841, 845 (C. C. A. 7). The case against petitioner depended upon proof that he participated in the actual transportation of the notes from Minne-

apolis to New York and he is in no position to complain because additional and different proof was required to tie in another defendant who had never left New York.[5]

5. Finally, petitioner asserts (Pet. 6–7, 25–26) that he was prejudiced by the following statement in the judge's charge to the jury (R. 826):

> It is not necessary at all for Turley or Jacobson to be out in Minneapolis at all. In saying what I am about to say please do not feel that I am expressing any view held by myself, but I am trying to illustrate to you. Let us say for example Turley agreed to finance Bollenbach and Burns in going out to steal those bonds in Minneapolis, knowing they were there in the clerk's office. He would be as guilty then if they brought back the bonds to Turley in New York as if Turley was out in Minneapolis, because they would be acting for him in this work.

[5] Petitioner also objects (Pet. 10, 26–27) to the admission of the testimony given by the defendant Jacobson before the grand jury that he had had a conversation with Turley and petitioner (R. 303) and that petitioner had played an active part with Jacobson in the attempt to secure payment of the $2500 Hart Smith & Co. check (R. 306–307, 309; see p. 5, *supra*). The testimony was admitted only against Jacobson (R. 313). It is well established that admissions by a conspirator subsequent to the conspiracy are admissible against him at a trial with other conspirators if the trial judge properly limits the applicability of such testimony to the person making the admissions. *Troutman* v. *United States*, 100 F. (2d) 628, 634 (C. C. A. 10); *United States* v. *Newhoff*, 83 F. (2d) 942, 944 (C. C. A. 2), certiorari denied, 299 U. S. 565; *Brooks* v. *United States*, 8 F. (2d) 593, 595 (C. C. A. 9).

> It is not for me to say, and I don't mean to indicate, as I said a moment ago, that that was the fact; but you are entitled to take all these circumstances into account in coming to a conclusion whether this is a planned theft or transportation of these bonds.

As the quotation itself shows, the trial judge explicitly admonished the jury that his illustration was not to be taken as an expression of his opinion upon the evidence. The illustration given was a correct statement of the law (*United States* v. *Seeman,* 115 F. (2d) 371, 374 (C. C. A. 2)), and it was, moreover, justified by the evidence. The judge was merely illustrating by reference to the circumstances presented by the proof the principle that a person may be guilty of causing the transportation of stolen property in interstate commerce although he himself never crosses state lines. Furthermore, in view of the evidence, this principle could have application only to Turley and Jacobson and petitioner could not have been prejudiced thereby. The jury were clearly and repeatedly told that the issues of fact were for their determination (R. 821, 826, 827, 829). Hence, even if the illustration given be considered an expression of opinion, it would not constitute grounds for reversal. *United States* v. *Murdock,* 290 U. S. 389, 394; *Quercia* v. *United States,* 289 U. S. 466, 469; *Horning* v. *District of Columbia,* 254 U. S. 135, 138, 139; *Allis* v. *United*

States, 155 U. S. 117, 123; *Simmons* v. *United States,* 142 U. S. 148, 155; *United States* v. *Goldstein,* 120 F. (2d) 485, 491 (C. C. A. 2), affirmed, 316 U. S. 114; *Marino* v. *United States,* 91 F. (2d) 691, 699 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States,* 302 U. S. 764.

CONCLUSIONS

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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